



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

COMPULSORY ARBITRATION AT THE SECOND HAGUE CONFERENCE.¹

It was in the natural course of things that the Second Conference of 1907, called to elaborate the work of 1899, should deal with the problem of extending arbitration along the lines indicated in the Russian proposal of 1899, and that the question should be reconsidered as to whether the nations could not and should not obligate themselves to refer disputes to arbitration.

In this connection it was possible to point to the fact that a large number of the most powerful and important signatory nations of 1899, as well as other nations not in the same class, had already taken steps in this direction in treaties concluded with various individual powers. The question was therefore asked whether it might not be possible to substitute a universal arbitration treaty instead of such a set of individual treaties, which must consist of $46 \times 45 = 2070$ conventions if it were to be complete, such universal treaty to embody a general obligation to submit to arbitration in a limited number of cases, but at the same time to form a nucleus for more comprehensive treaties to be concluded by the various individual nations. This question was propounded on all sides.

The United States of America made a proposition at the very beginning of the Conference, according to which the nations were to pledge themselves to refer to the Permanent Court of Arbitration of The Hague all differences of a legal nature or such as related to

¹ The above is a translation of an extract from an article on International arbitration, contributed to Herder's *Staatslexikon*, 3d edition, second volume, by Dr. Heinrich Lammasch, Professor of International Law in the University of Vienna.

It is not the custom of the JOURNAL to publish material which has appeared elsewhere, but as Dr. Lammasch is Umpire in the North Atlantic Coast Fisheries Arbitration between Great Britain and the United States, his views on arbitration are of peculiar interest. The JOURNAL therefore translates and publishes the article, which is as valuable as it is interesting. — J. B. S.

the interpretation of international treaties, provided they could not be settled by diplomacy and did not affect the vital interests, the independence, or the honor of either of the parties or the interests of third nations; however, the right was to be reserved by each party to decide itself whether its vital interests, independence, or honor were affected by the dispute. The propositions of Portugal and Sweden went further, for they added to this general but conditional obligation a limited but unconditional obligation to arbitrate certain disputes, while a proposition made by Servia contained only such a list of cases to be settled unconditionally by arbitration. A proposition made by Brazil constituted a variation of the American proposition, going further in some directions and being more restricted in others. The German Empire opposed all these propositions from the start. Although its first delegate, Baron von Marschall, could not express himself strongly enough to show the recognition of the principle of arbitration by Germany, both he and the second delegate, Privy Councillor Dr. Kriege, boldly and energetically opposed every definite proposition made in this direction. The general American proposition was objected to by Germany on the ground that it was useless and only a sham owing to the broad exceptions. To this it may be answered that the laying down of the principle in this form is not only of moral significance, as pointed out by the Austro-Hungarian delegate, von Merey, but has an extensive legal bearing. For even a qualified and conditional recognition of the obligation to submit to arbitration is a recognition of the fact that the arbitration of such disputes, after an unsuccessful attempt to settle them by diplomacy, is the normal method of settling them. If a nation does not wish to consent to arbitrate a question as proposed by the adversary in a given case, it must justify its refusal by invoking the vital interests or national honor clause. To be sure, this excuse does not need to be explained in detail, it being sufficient simply to advance it, but nevertheless the nations will generally hesitate to avail themselves of this pretext unless it is really warranted. Self-respect alone will restrain them from representing their honor as being too vulnerable or their vital interests as being too easily jeopardized.

Therefore, if a nation can not refuse to accept arbitration, when proposed by the other side, without invoking its honor or its vital interests, such refusal will not be so easy for it as without such a requirement. Such an obstacle to the refusal to submit to arbitration will certainly not operate to the detriment of international justice and peace. Moreover, the stipulation of article 16 of the convention of 1899 (now article 38 of the convention of 1907) is indeed contained in a treaty, but it has not the character of a treaty itself. It is nothing but the recognition of a theoretical idea or the advocacy of arbitration, but it implies no obligation to submit thereto. It is similar to the clauses of certain constitutions, which do not expressly lay down binding rules of law, but are merely intended as guides for future legislation and as such frequently remain unenforced for many years. However, this idea would have been converted by the Russian proposition of 1899 and the American proposition of 1907 into an actual treaty stipulation embodying a legal obligation, even although the latter were subject to very broad exceptions. This was perhaps just what certain nations did not want. Besides, the objection was made to this proposition that it did not limit the mission of arbitration with sufficient clearness, the distinction between questions of a legal nature and those of a political nature not being sharp enough, and that it did not even eliminate unimportant controversies for the settlement of which the procedure of arbitration is too cumbersome and expensive. The latter objection does not seem to apply, for arbitration will at all events only be resorted to in cases where a settlement by diplomacy has been unsuccessfully attempted. When this is the case, no other settlement except by arbitration will be possible unless the controversy is to be indefinitely prolonged so that, in spite of its original insignificance, it may assume a threatening character at some period of strained relations between the nations.

Even the second objection that a sharp distinction can not be drawn between questions of a legal and those of a political nature does not seem to be of decisive importance. The German Empire itself waived this objection in the treaties concluded by it with Great Britain and the United States of America, in both of which it in-

cluded this very clause. As a matter of fact, the exception of those cases in which the vital interests and honor are affected and the mention of the interpretation and application of treaties as being the principal field of application of arbitration would seem to define the idea of questions of a legal nature with sufficient accuracy. Furthermore, even in this connection it is left to the contending parties themselves to judge whether the controversy in question is a legal or political one. Finally, there would certainly have been no insurmountable objection in refraining entirely from mentioning questions of a legal nature in the text of the treaty and in confining the obligation to disputes regarding the interpretation and application of treaty stipulations. At the final vote thirty-five nations expressed themselves in favor of this American article (as partially amended by Sir Edward Fry), while five nations voted against it (Germany, Austria-Hungary, Turkey, Greece, and Roumania, Austria-Hungary having been more favorable to the proposition at first ²), and four nations abstained from voting. The result of this vote was that, although the number of votes in favor of the article was seven times that of the votes against it, the article could not be included in the acts of the Conference, since a unanimous or at least almost unanimous agreement is necessary to adopt resolutions at international conferences.

Besides the American proposition, the conference was especially concerned with one made by Portugal, to the effect that the nations should obligate themselves unconditionally and without exception to arbitrate a small class of specifically defined disputes, such an obligation either being assumed in addition to the general obligation in accordance with the American proposition, which is broader, but subject to the exceptions indicated, or else in substitution therefor. The latter suggestion was made by Servia and the former by Portugal and Sweden, in connection with the treaties mentioned above and in accordance with a resolution adopted on motion of E. von Plener by the Inter-Parliamentary Union for Arbitration at its London conference held in 1906. At the beginning this proposition of Portugal

² See Von Mery's statement previously referred to in the text.

met with opposition on the part of Germany and Belgium as well as Great Britain and the United States of America. It did not even receive the hearty approval of France at first. However, in the course of a thorough discussion, Great Britain, the United States, and France fully indorsed the idea, so that there was finally a combined English-American-Portuguese proposition to adopt a list of cases unconditionally subject to arbitration. In form this proposition appeared as a supplement to the general but conditional obligation to submit to arbitration which it was desired in the American proposition to establish with respect to controversies of a legal nature. As a matter of fact, however, inasmuch as it was impossible to have this obligation accepted by all the Powers at the Conference, the English-American-Portuguese proposition came to be the only form in which the recognition of the principle of arbitration, with respect at least to certain controversies, could be expected. Baron von Marschall had at first held out the hope that perhaps the opposition of Germany to such an unconditional obligation with respect to a restricted number of cases might not be so insurmountable as her opposition to the general conditional proposition. Consequently all efforts of the friends of arbitration were now concentrated on this proposition, which was without doubt less significant in fact; for though it was evident to every one that this form of obligation could only extend to comparatively insignificant cases, nevertheless it now seemed to be the only form in which the principle of arbitration could be saved. This is the only way in which the obstinacy of the struggle for and against the list, so insignificant in itself, can be explained.

As the discussion proceeded, however, Baron von Marschall and Dr. Kriege used all their legal acumen in combating the list, for, to the regret of all, Professor Zorn, the German delegate, friendly to arbitration, was excluded from the labors of the commission. In the first place, the list was ridiculed owing to the small number and the insignificance of the cases enumerated therein. This did not occur at the Conference itself, to be sure, but in the discussions of publicists. It is certainly true, as said before, that of the eight subjects which the majority of the Conference thought

it possible to submit without exception to arbitration, probably only one is of great practical importance, viz., the subject of claims for damages of one nation against another, in regard to which arbitration should become compulsory when both parties admit the existence of the claim "in principle" and the only question remaining is the amount thereof and the mode of satisfying it. Under this condition a submission to a court of arbitration could certainly not impair the national sovereignty, while it would be likely to bring about a just settlement of the dispute. The other points on the list were of such minor importance that the votes approving them were given chiefly for the purpose of confirming the principle of compulsory arbitration. However, a number of fundamental objections were raised by Germany against these subjects as well as against every subject in regard to which it might be proposed to render arbitration compulsory by virtue of a general treaty. These objections, which were presented and defended with the greatest sagacity, had at least the merit of forcing the advocates of compulsory arbitration to examine the problem much more thoroughly. Whether they warranted the conclusions which were pretended to be drawn from them is of course another question.

In the first place, the fact was pointed out, that, according to the Portuguese-English propositions, even those disputes must be referred to arbitration which had already been passed upon by the courts of one of the contracting nations, and that conflicts might thereby arise between the national and this species of international jurisdiction. It was objected that a judgment rendered by the highest court of a country could neither be reversed nor revised by a court of arbitration: otherwise the jurisdiction of the nation in question might be impaired by the award and the principle might also be violated that no one can be denied the right to be tried by his regular judge. This objection applies exactly to the case in which the international court of arbitration is created solely for the purpose of deciding specific cases. Let us suppose that the publisher A has published a work of the foreign author B, contrary to the stipulations of a copyright convention existing between the nations in question. Suppose B has lost his suit before the courts of the

nation to which A belongs, because these courts, misinterpreting the international treaty, have assumed that there was no infringement of the copyright. Diplomatic representations on the part of the nation to which the author belongs fail to secure him his rights. This nation then induces the nation of which the publisher is a subject to refer the question of the interpretation of the copyright treaty, as well as the decision regarding the claim for damages, to a court of arbitration. In this case, if the court of arbitration decides against him, the publisher A will be deprived of the advantage which he had secured in a trial which was lawful in form if not just in substance. He can complain that an otherwise unassailable judgment has been set aside to his detriment, and that he has been denied the right to be tried by his regular judge, since the judicial organization of his country recognizes no international courts above the national ones. Therefore, it can not be denied that, in form, the authority of the national courts is impaired by an international court in such a legal proceeding, even although justice may have been accomplished thereby in substance.

However, the matter is quite different when the decision of the question as to which of two conflicting interpretations of a copyright treaty is correct is referred to a court of arbitration beforehand, not by an agreement concluded for the specific case in point, but by an international treaty applicable to all cases of this kind. Such a treaty declares in general terms that, in case of a disagreement between the two nations regarding the interpretation of such treaty stipulation, the decision of the legal point as to which meaning is to be assigned to the stipulation shall belong in the last resort not to the highest court of the nation of the defendant, but to a court of arbitration. By such an international treaty or such an arbitration clause the judicial organization of the contracting nations is overturned or supplemented with respect to such decision, inasmuch as the international court of arbitration is designated to take jurisdiction above the highest national court for the decision of this class of questions. For this very reason an arbitration treaty or clause of this kind requires, for its validity, the sanction of the authority having power to modify the judicial organiza-

tion under the constitution, which authority in most nations is the parliament. When this sanction is given, the rules regarding the jurisdiction of the national courts of the contracting nation are thereby supplemented. The highest court in the nation to which the defendant belongs can not then complain that a different tribunal has been arbitrarily placed above it, and the defendant himself can not complain that he has arbitrarily been deprived of the right to be tried by his regular judge. For both things have happened in pursuance of a provision of law which has been regularly enacted and which binds and restricts both courts and individuals. The situation is exactly the same in all other cases in which a certain category of disputes to be decided by the courts is referred once for all to an international court of arbitration by virtue of a general arbitration treaty. In all these cases a conflict between international and municipal law is as much precluded as it is inevitable when the decision of a specific case is referred to a court of arbitration.

A further objection related to the question as to what significance an arbitral award should have with regard to future administrative measures and the future judicature of the two nations concerned. As regards the administrative measures the answer is clear. According to article 37 of the convention for the peaceful settlement of disputes, the nations are obliged to execute the award in good faith. Therefore, if the award determines that the interpretation hitherto given to a treaty stipulation by the administrative authorities is incorrect, the national government shall be obliged to instruct its officials that they must henceforth adhere to the interpretation given by the court of arbitration. The matter is more difficult in the case of courts whose independence is recognized. In this case, if the courts do not voluntarily agree to the verdict of the court of arbitration, the government will either have to embody the interpretation of the latter in its legislation as an authentic one binding even on the courts, or else, if its courts render decisions subsequently which are not in conformity therewith, it will have to see that such decisions are rectified by a new court of arbitration. The latter course will always constitute a means of avoiding a conflict between treaty obligations and the administration of justice. A shorter method of

attaining the object would, assuredly, be that suggested at the Second Conference, viz., the embodiment in the arbitration treaty of a clause assigning to the award the force of an authentic interpretation of the treaty. If such a treaty receives the sanction prescribed by the constitution, it becomes an integral part of the law of the land and is binding even on the courts.

Another objection which occupied the Conference in this connection was that in regard to collective treaties, especially so-called "World treaties." The determination by a court of arbitration of the meaning of one of their stipulations involved in a controversy between two nations might lead to the dissolution of the "Union," created by such treaties, inasmuch as the other parties to such a world treaty might, in their relations with one another, construe such stipulation otherwise than the court of arbitration had construed it in the relations between the two contending parties, and even a subsequent award might construe the same point still differently between nations C and D than it had been construed between nations A and B. However, does it not happen in the internal administration of justice that two courts or even the same court in different judgments decide differently between different parties? This is chiefly owing to the circumstances that the facts are seldom exactly alike even in two apparently identical cases. To be sure, the cause may also lie solely in a difference of legal opinion. In a case where a dispute which has already been decided by a court of arbitration between nations A and B also arises between nations C and D, the first award will certainly have a great moral significance to the second court of arbitration, so that it will only be able to depart from the tenor of the first award in case it regards it as wholly unjustified. In this case, however, the second award may, by the force of its arguments, have the effect of renewing the controversy between nations A and B and of serving to rectify the original erroneous judgment (even international courts of arbitration are not infallible), thereby serving to bring about substantial justice. The committee of the Second Conference made a number of notable suggestions regarding this conflict of decision, but it is impossible to discuss them here.

Finally, the question was raised as to what should be done if the

award obliged one party to amend its laws and the parliament opposed the adoption of such an amendment. In answer to this it was pointed out that such obligation, which admittedly placed the parliament in an embarrassing situation, may also arise in other cases, as, for instance, when a treaty of peace is concluded or as a result of other international agreements which have been concluded without the coöperation of parliament. Austria gave an example of the faithful fulfillment of such a duty in 1902 when she repealed the law imposing an extra sugar tax, because the Brussels Sugar Commission had expressed the view, by a majority of votes at its first session, that this law was in conflict with the spirit of the Brussels Sugar Convention. This Sugar Convention of 1902 furnishes an instance to show that under certain circumstances a court of arbitration is authorized to decide whether or not the municipal legislation of a nation is in accord with the obligations assumed by it in treaties. Of course an attempt to organize a world market, as first made by that treaty with respect to a certain article, requires an international supervision and control, and it is likewise a matter of course that such a supervision can be intrusted with much greater confidence to a really impartial court of arbitration such as the Commission created by said treaty than to a group of interested parties.

It seemed inconsistent with the spirited and energetic opposition of the German delegates to compulsory arbitration for them repeatedly to advocate in the near future the creation of an international court of appeals for the purpose of taking final cognizance of disputes regarding international private law. It seemed likewise inconsistent for Germany as well as Great Britain to take the initiative in favor of establishing an international prize court; for the creation of such a prize court with power to pass upon the lawfulness or unlawfulness of the acts of naval officers in war times would certainly constitute a more radical impairment of the sovereignty of the contracting nations than the institution of an international court of arbitration for the purpose of construing a copyright convention or another convention relating to subjects of international private law.

In deliberations in both the large and small committees and lasting almost four months under the direction of Léon Bourgeois, who

had proven his capacity as a presiding officer at the First Conference, a number of the most prominent jurists of Europe and America examined the objections made. Endeavor was made, in a spirit of conciliation, to break the force of the objections by means of concessions rather than to refute them outright. Among the jurists may be mentioned: Frederic von Martens, the Nestor of conferences on international law; Asser, the most thorough expert in international private law; Sir Edward Fry, the master of the English common law; Fusinato and Hammarskjöld, the Italian and Swedish jurists who are equally prominent both from a theoretical and practical standpoint; the American jurist Choate, prominent both in diplomacy and in the courts; Mr. J. B. Scott, equally able as a professor and as a lawyer; Ruy Barbosa, the sagacious thinker and brilliant orator from Brazil; Drago, who has become celebrated through his acts as Minister of Foreign Affairs of Argentina; and above all, Louis Renault, aided by his skilful assistant Fromageot, won the admiration alike of friend and foe by his superior intelligence, experience, and forcible eloquence. As far as compatible with his instructions, the author of this article also endeavored to support all efforts looking to an agreement. At the last ballot 32 votes were given in favor of and 8 against the English-American-Portuguese proposition, which was ably and eloquently supported by the two Portuguese, Marquis Soveral and Mr. Oliveira, as well as by the Servian Milovanovitch. In this ballot those voting against the proposition were Germany, Austria-Hungary, Belgium, Bulgaria, Greece, Roumania, Switzerland and Turkey, three nations, Japan, Luxemburg, and Montenegro, refraining from voting. After the conciliatory propositions of Austria-Hungary (Merey) and Switzerland (Carlin and Max Huber) had been rejected, the conference agreed on a declaration drafted chiefly by Tornielli, viz.:

The conference has resolved to make the following declaration, in a spirit of conciliation and mutual concession, which is the spirit that has prevailed over the deliberations. This declaration, while preserving to each of the Powers represented the advantage of its vote, enables all to confirm the principles which they regard as being generally recognized. It agrees unanimously (1) in recognizing the principle of compulsory arbitration, and (2) in declaring that certain differences, and especially

those relating to the interpretation and application of international treaty stipulations, may be suitably made subject to compulsory arbitration without any restriction.

In the German *White Book*, page 39, a rather free translation of the declaration is given. The deviation of the translation from the original is especially significant at the beginning, where it reads *each of the Powers reserves the right to maintain its own standpoint*, instead of *each of the powers reserves the advantage of its vote*, as in the original. It is probable that this wording was chosen in order to enable the 32 nations constituting the majority in the vote at The Hague to conclude a special treaty on compulsory arbitration subsequently among themselves outside the conference.³

Although it is true that probably no war would ever have been prevented by adopting the "list," there is likewise no doubt that its adoption "in principle" would have been of greater value than the high sounding words of the aforecited declaration. Consequently those who are called "peace lovers" with a certain shrug of the shoulders were not the only ones who regretted its rejection.

HEINRICH LAMMASCH.

³ Cf. Bourgeois' speech in the report of Charles Dupuy to the French Senate, 1907, No. 337, page 77, and French *Yellow Book*, page 116.